

IN THE MATTER OF UNIT CLARIFICATION NO. 9-88

-VS-

Respondent.

* * * * *

A hearing on the above-captioned matter was held on Tuesday, December 13, 1988 in the Jury Room of the Dawson County Courthouse in Glendive, Montana. The Petitioner was represented by David Stiteler, Staff Attorney, Montana Public Employees Association. The Respondent/Employer was represented by Eric Trimble, Labor Relations Specialist, Montana State Personnel Division. Arlyn L. Plowman was the duly appointed Hearing Examiner for the Board of Personnel Appeals. The parties offered evidence, examined and cross examined witnesses, made argument and filed post hearing briefs. The matter was deemed submitted on January 9, 1989.

On October 13, 1988 the Montana Public Employees Association filed, with the Board of Personnel Appeals, a

1 petition for Unit Clarification. In that petition the
2 petitioner proposed to include Habilitation Aides III in an
3 existing bargaining unit made up of Habilitation Aids I,
4 Habilitation Aids II, maintenance workers, custodial workers,
5 food service workers and cooks.

6 On November 3, 1988 the Employer\Respondent, State of
7 Montana, Department of Institutions, Eastmont Human Services
8 Center responded to the petition. In that response the
9 Respondent argued that the incumbent Habilitation Aids III
10 are supervisors and therefore should be excluded from the
11 bargaining unit. The Respondent requested that the petition
12 be dismissed.

13 Subsequently a Hearing Examiner was appointed and the
14 matter was noticed for hearing.

15 III. FINDING OF FACT

16 1. The Eastmont Human Services Center, hereafter
17 Eastmont, is operated by the State of Montana, Department of
18 Institutions. It consists of several buildings on a campus
19 in Dawson County and provides training for approximately 55
20 profound developmentally disabled residents. The residents
21 are housed in two cottages, 15 in Cottage II, 40 in Cottage
22 III.

23 2. Eastmont employs three persons (See exhibit R-2)
24 classified as Habilitation Aides III, Class Code 355016,
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1 placed at Grade 9 in the State Employee Classification and
2 Pay Plan (Section 2-18-101 et. seq., MCA). They each work
3 separate eight hour shifts, five shifts per week.

4 3. Similarly classified employees of the State of
5 Montana, Department of Institutions, Montana Development
6 Center, Boulder, Montana are members of a bargaining unit.

7 4. The Eastmont Position Roster (Exhibit R-2) lists
8 the following FTE (Full Time Equivalent) Habilitation
9 Services positions: Institutional Services Manager II, one
10 FTE; Habilitation Aid III, three FTE; Habilitation Aid II,
11 seven FTE; Habilitation Aide I, 30.5 FTE and Behavior
12 Modification Therapist, two FTE.

13 5. The Eastmont Organizational Chart (Exhibit R-1)
14 places the Habilitation Aide III under the supervision of the
15 Institutional Services Manager II.

16 6. The Habilitation Aid III Class Specification
17 (Exhibit R-15) and the Position Description for Eastmont
18 Human Services Center Habilitation Aid III (Exhibit R-3) both
19 ascribe supervisory duties to Habilitation Aids III. These
20 documents assign them supervisory responsibilities for the
21 Habilitation Aids I, and Habilitation Aids II on their
22 respective shifts. The Habilitation Aids III are designated
23 as Shift Supervisors.

24 7. The Habilitation Aids III are a direct link in the
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1 chain of command between the Institutional Service Manager II
2 and 37.5 FTE Habilitation Aids I and Habilitation Aids II.

3 8. Habilitation Aids I are first employed as
4 substitutes. As Habilitation Aid I vacancies occur
5 applicants from the ranks of the Habilitation Aid
6 substitutes are interviewed by a three member selection
7 committee. The Habilitation Aids III participate in the
8 selection committee for Habilitation Aid I vacancies on their
9 respective shifts. The selection committee works to reach a
10 consensus and then makes a recommendation. The final
11 selection or hiring decision is made by the superintendent.
12 Although the Habilitation Aids III sit on a committee that
13 makes a recommendation, there is little evidence, if any,
14 that any Habilitation Aid III, by herself on her own accord,
15 can effectively recommend the hiring of a particular
16 applicant.

17 9. The Habilitation Aid III has the authority to
18 assign/transfer Habilitation Aids I and Habilitation Aids II
19 to a particular task, cottage and/or care group on their
20 respective shifts. While transfers/assignments are limited
21 by normal operating procedures, the Habilitation Aid III's
22 authority to transfer within her particular area of
23 responsibility is more than routine or clerical.

24 10. The hiring and firing authority and practices of
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1 Eastmont supervisors are subject to the same limitations
2 applicable to other supervisors in state government. State
3 government supervisors are subject to greater review than
4 their private sector counterparts.

5 The Habilitation Aids III do not have the authority to
6 suspend other employees. There have been too few
7 Habilitation Aid I or Habilitation Aid II suspensions at
8 Eastmont to demonstrate whether the Habilitation Aids III can
9 or do make effective recommendations regarding suspensions.

10 There is insufficient evidence to support a finding that
11 the Habilitation Aids III have the authority to layoff,
12 recall, or discharge another employee or to effectively
13 recommend such action.

14 11. The Habilitation Aid III writes the first draft of
15 her subordinates performance evaluations. A poor
16 performance evaluation effectively diminishes the
17 probability that a substitute Habilitation Aid will be
18 upgraded to full time. The Habilitation Aid III provides
19 first line performance evaluation of her subordinate
20 Habilitation Aids I and Habilitation Aids II. Her
21 evaluations and recommendations effectively influence the
22 promotion of her subordinates or the granting of other
23 rewards.

24 12. The Habilitation Aid III has the authority to
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1 responsibility direct the work of her subordinates.

2 13. The Habilitation Aid III does not adjust union
3 grievances.

4 14. The Habilitation Aids III are responsible for their
5 respective shifts. Their supervisor is usually on duty only
6 during normal business hours. The Habilitation Aids III
7 work many hours outside normal business hours and are "in
8 charge" of habilitation services in their supervisor's
9 absence. Were the Habilitation Aids III not supervisors, it
10 would leave substantial time during which the considerable
11 number of Habilitation Aids I and Habilitation Aids II work
12 without supervision.

13 15. The Habilitation Aids III are responsible for
14 reporting rule infractions.

15 16. The Habilitation Aids III fill an important
16 evaluation and disciplinary role for the Eastmont Human
17 Services Center. The operation of the center depends upon
18 important supervisory functions performed by the Habilitation
19 Aids III.

20 IV. CONCLUSIONS OF LAW

21 1. The Board of Personnel Appeals has jurisdiction in
22 this matter pursuant to Section 39-31-202, MCA. See Billings
23 Montana vs Fire Fighters Local 529, 113 LRRM 3324, 651 P.2d
24 627, Montana Supreme Court 1982.

1 2. Section 39-31-103, MCA exempts "supervisory
2 employees" from the definition of and employee. A
3 "supervisory employee" is further defined as:

4 ... Any individual having authority in the interest
5 of the employer to hire, transfer, suspend, layoff,
6 recall, promote, discharge, assign, reward,
7 discipline other employees, having responsibility
8 to direct them, to adjust their grievances, or
9 effectively to recommend such action, if in
10 connection with the foregoing the exercise of such
11 authority is not of a merely routine or clerical
12 nature but requires the use of independent
13 judgment.

14 Similar language is found in the National Labor
15 Relations Act at 29 U.S.C. 151(11).
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17 3. The Montana Supreme Court has the approved the
18 practice of the Board of Personnel Appeals in using Federal
19 Court and National Labor Relations Board precedence as
20 guidelines for interpreting the Montana Collective Bargaining
21 for Public Employees Act as the State Act is similar to the
22 Federal Labor Management Relations Act, State ex. rel. Board
23 of Personnel Appeals v. District Court, 183 Mont. 223 (1979)
24 598 P. 2d 1117, 103 LRRM 2297; Teamsters Local No 45 v. State
25 ex. rel. Board of Personnel Appeals, 195 Mont. 272 (1981),
635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young
(III), 683 P.2d 185 (1984), 119 LRRM 2682.

 4. The existence or exercise of any one of the
authorities enumerated in the above definition of supervisory

1 employee combined with independent judgment is sufficient to
2 confer supervisor status, regardless of how seldom the power
3 is exercised. See George C. Foss Company vs. NLRB, 118 LRRM
4 2746 752 F.2d 1407, CA 9 (1985). The incumbent Habilitation
5 Aids III have authority to assign, transfer and responsibly
6 direct employees on their respective shift. Their first line
7 evaluation responsibilities and their duty to report
8 infractions effectively recommends the discipline/promotion
9 of other employees.

10 5. While the hiring and firing practice of supervisors
11 at the Eastmont Human Services Center are subject to the same
12 limitations as all supervisors in state government, it is
13 the relationship of the evaluation and disciplinary role to
14 the whole organization that is important. See NLRB v. Beacon
15 Light Nursing Home, 125 LRRM 3414, 825 F.2d 1076, CA 6,
16 (1987).

17 V. RECOMMENDED ORDER

18 IT IS HEREBY ORDERED that the above-captioned Unit
19 Clarification Petition be dismissed.


20 VI. SPECIAL NOTICE

21 Exceptions to these Findings and Conclusions and to this
22 Recommended Order may be filed within twenty (20) days of
23 service thereof. If no exceptions are filed the Recommended
24 Order shall become the Final Order of the Board of Personnel
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1 Appeals. Address exceptions to the Board of Personnel
2 Appeals, P. O. Box 1728, Helena, Montana 59624.

3 Dated this 22nd day of February, 1989.

4 BOARD OF PERSONNEL APPEALS

5 By: 
6 Arlyn L. Plowman
7 Hearing Examiner

8 * * * * *

9 CERTIFICATE OF SERVICE

10 The undersigned hereby certifies that on the 22nd
11 day of February, 1989, a true and correct copy of this ORDER
12 was served upon each party by personally depositing the same
13 in the U. S. mails, postage prepaid and addressed to each of
the following:

14 David Stiteler
15 Staff Attorney
16 Montana Public Employees Association
P. O. Box 5600
Helena, MT 59604-5600

17 Eric Trimble
18 Labor Relations Specialist
19 Labor Relations and Employee Benefits Bureau
Room 116, Mitchell Building
Helena, MT 59620

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22 Exhibit List

23 Exhibit R-1 Organizational Chart
24 Exhibit R-2 Position Roster
25 Exhibit R-3 Position Descriptions

1 Exhibit R-5 Performance Evaluation Forms
2 Exhibit R-6 Evaluation of Habilitation Aid I applicant
3 Exhibit R-7 Supervisor Notes of Barb Jassen
4 Exhibit R-8 Memo/Notes Re: Three Separate Disciplinary
5 Problems
6 Exhibit R-9 Memos and forms relating to work hours and
7 schedules.
8 Exhibit R-10 Memos relating to work assignments
9 Exhibit R-11 Memos regarding in-service training
10 Exhibit R-12 Employee Injury Reports
11 Exhibit R-13 Memos authored/co-authored by Habilitation
12 Aids III
13 Exhibit R-14 Charts
14 Exhibit R-15 Class Specification for Habilitation Aids I,
15 Habilitation Aids II and Habilitation Aids III
16 Exhibit R-16 Board of Personnel Appeals file regarding UD
17 11-83

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